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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 569

THE ASPINOOK CORPORATION,
Petitioner,

vs.

THE HONORABLE JOHN BRIGHT, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILTON PAULSON,
Attorney for Respondent.

On the Brief:
GLORIA AGRIN.

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OTHER AUTHORITIES

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Opinions Below

The opinion, *per curiam,* of the Circuit Court of Appeals for the Second Circuit and the concurring opinion of Frank, J., are printed at pages 116-118 of the record; and are not officially reported. The respondent rendered no opinion in the District Court.

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended by the Act of February 13, 1925;

and, in the alternative, under Section 262 of Judicial Code (28 U. S. C. A., Sec. 377), as amended by the Act of March 3, 1911.

Summary of Argument

We contend:

I. This case involves neither a question of public importance, nor, a conflict of decision among the Circuit Courts. Certiorari is not ordinarily granted merely to review alleged error, prior to final decree. In any event, the Court below committed no error in refusing to grant a writ of mandamus.

II. Section 61-b of the New York General Corporation Law is a procedural statute, not binding upon the federal courts. Respondent properly refused to apply that section in denying petitioner's motion for security. The Court below properly refused to require respondent to reverse himself.

III. Assuming that Section 61-b is substantive law, it violates the Constitution of the United States.

I

The Court below denied petitioner's application for a writ of mandamus upon the ground that the circumstances did not warrant the exercise of its power to grant that extraordinary remedy (R. 116-118). It is not suggested by petitioner that the Circuit Court thereby determined any question of wide public importance, or one involving a conflict of decision among the Circuit Courts. The instant application for a writ of certiorari is based solely upon the ground that in arriving at its decision the Court below committed error (Pet. Br., p. 6).

Certiorari will not ordinarily be granted merely to review alleged error (*Cyclopedia of Federal Procedure*, 2nd Ed., Vol. II, Section 5400, p. 11). This is particularly true

where such review is sought prior to final decree (*American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893); *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916)).

In any event, the Court below committed no error in refusing to grant a writ of mandamus under the circumstances of the instant case. Mandamus is granted or withheld in the sound discretion of the Court (*Ex parte Republic of Peru*, 318 U. S. 578, 584 (1943)). It is well settled, however, that the extraordinary remedy of mandamus is reserved for "really extraordinary causes" (*Ex parte Fahey*, 332 U. S. 258 (1947)). The denial, therefore, of an application for a writ of mandamus is erroneous only if it involves an abuse of the discretion which lower Courts have frequently been cautioned to exercise sparingly (*United States Alkali Exp. Assoc.* v. *United States*, 325 U. S. 196 (1945); *In the Matter of Peterson*, 253 U. S. 300 (1920); *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943)).

The subject action is an ordinary civil suit between private litigants. The issue presented to respondent was simply whether the plaintiff should be required to furnish security for certain expenses or whether he could prosecute the suit without posting such security. Such a controversy can hardly be said to fall within the category of "really extraordinary causes" for which the extraordinary remedy of mandamus is reserved.

If mandamus is available to review the denial of petitioner's motion for security, then there is no reason why any other interlocutory order in a civil suit should not likewise be reviewed by mandamus proceedings. The Court below recognized that to grant mandamus in the circumstances of the case at bar would be to "invite continued resort to it for various and sundry steps preliminary to trial which a litigant finds expensive or otherwise disturbing" (R. 117).

The only extraordinary circumstance which petitioner claims to exist in the case at bar is the alleged inadequacy

of its remedy by appeal from the interlocutory order denying its motion for security (Pet. Br., p. 16). The Court below, in rejecting that contention declared (R. 117):

> "Here, if after final judgment, either party appeals to this court, full review and protection of the parties can be afforded; only in the single instance where judgment goes against the suing plaintiffs *and* they choose not to appeal will there be a chance of the corporation suffering loss because of its statutory duty, N. Y. General Corporation Law, Section 64, to reimburse its officers for their expenses in winning. Such burdens accompanying success in litigation are of course usual in our jurisprudence." (Italics, the Court's.)

Indeed, the lower Court held that many cases where a writ of mandamus was refused, "show circumstances of at least as much, if not greater, potential loss of rights or position, as is here indicated" (R. 117).

Moreover, a litigant has no absolute or constitutional right of appeal (*Millslagle* v. *Olson,* 130 F. 2d 212, 214, 8th Cir. (1942)). The complete absence of the right of appeal "is not in itself sufficient to invoke the power of mandamus" (*U. S. ex rel. C. etc. Co.* v. *Interstate C. C.,* 294 U. S. 50, 62 (1935)).

It is well settled that mandamus will not be granted unless the right to be enforced is clear and definite. "The purpose of the writ is not to establish a legal right, but to enforce a right which has already been established • • •" (*U. S.* v. *Nordbye,* 76 F. 2d 744, 746, 8th Cir. (1935)).

Petitioner's right to security under Section 61-b is doubtful, to put it mildly. The overwhelming weight of authority holds that Section 61-b is a procedural statute not applicable in the federal courts (*Boyd* v. *Bell,* 64 F. Supp. 22 (S. D. N. Y., 1945); *Craftsman Finance & Mortgage Co.* v. *Brown,* 64 F. Supp. 168 (S. D. N. Y., 1945); *Cohen* v. *Beneficial Industrial Loan Corporation,* 7 F. R. D. 352 (D. N. J., 1947)). In the Court below, Judge Frank based

his concurrence in the denial of mandamus upon the ground that Section 61-b was a procedural statute (R. 118).

In addition, there is grave doubt as to the constitutionality of Section 61-b. The Circuit Court of Appeals expressly referred to the "suggestions of unconstitutionality in Zlinkoff, *The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law*, 54 Yale L. J. 352, and article by Mr. Hornstein in 32 Calif. L. Rev. 123, and 47 Col. L. Rev. 1" (R. 118).

Accordingly, the Court below properly held that it "should not act in a case where the legal right is clouded in so much doubt as is here indicated" (R. 117).

We submit that under the circumstances in the case at bar the denial by the Court below of petitioner's application for a writ of mandamus was not an abuse of its discretion, but, on the contrary, was in complete accord with the decisions of this Court. The instant application, therefore, for a writ of certiorari is entirely without legal basis.

II

In any event, Section 61-b is a procedural statute which respondent properly declined to follow in denying petitioner's motion for security (*Boyd* v. *Bell, supra; Craftsman Finance & Mortgage Co.* v. *Brown, supra; Cohen* v. *Beneficial Industrial Loan Corporation, supra*). In the Court below Judge Frank expressed the view that (R. 118):

> "I think we should deny the petition on the ground that Judge Bright's order was correct because, as he held, the New York statute is 'procedural' so far as the federal courts are concerned. I agree substantially with his reasoning in *Boyd* v. *Bell*, 64 F. Supp. 22. See also *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 178-179; *Cohen* v. *Beneficial Industrial Loan Corp.*, 7 F. R. D. 352; cf. *Picard* v. *Sperry Corporation*, 36 F. Supp. 1006, 1009-1010, affirmed 120 F. (2d) 328 (C. C. A. 2); *Galdi* v. *Jones*, 141 F. (2d) 984, 992 (C. C. A. 2)."

Had the majority of the Court below reached that question, they would undoubtedly have come to the same conclusion.

Rule 23(b) of the Federal Rules of Civil Procedure is similar to Section 61-b in that both impose restrictions and conditions upon the institution of derivative actions; and both leave unaffected the cause of action itself. The Federal Courts have uniformly held that Rule 23(b) is procedural (*Perrott* v. *United States,* 53 F. Supp. 953 (D. Del., 1944); *Summers* v. *Hearst,* 23 F. Supp. 986 (S. D. N. Y., 1938)).

The New York State Court has squarely held that a New Jersey statute, identical with Section 61-b, is procedural (*Shielcrawt* v. *Moffett,* 184 Misc. 1074, 56 N. Y. S. 2d 134). The Governor of New York State, in his message approving Section 61-b, expressed the view that the legislation was remedial, not substantive, when he stated "It does not bar any action; it does not bar any right".

Section 61-b of the New York General Corporation Law is, we submit, a procedural statute which respondent was not obliged to follow. He committed no error in denying petitioner's motion for security based on that section. The Court below committed no error in refusing to require respondent to reverse himself.

III

Section 61-b of the New York General Corporation Law deprives petitioner and its stockholders of their property without due process in violation of the Fourteenth Amendment of the Constitution.

Petitioner's right of action against its faithless fiduciaries is a property right (*Pritchard* v. *Norton,* 106 U. S. 124, 132 (1882)). Section 61-b has reduced the right of petitioner's stockholders to bring a derivative action to an empty formality. The amount of security which the stockholder can be called upon to furnish—$90,000 in the in-

stant case (R. 13)—is prohibitive. The stockholders' remedy is barred as effectively as if the statute had abolished it in terms. As stated by this Court, "want of right and want of remedy are the same thing" (*Edwards* v. *Kearzey*, 96 U. S. 595, 600 (1878); *Ex parte Young*, 209 U. S. 123, 147 (1908); *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, 47 (1922)).

This Court has long recognized "the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed" (*Graham* v. *Goodcell*, 282 U. S. 409, 426 (1931)). Plaintiff acquired his stock in petitioner upon the assumption that he obtained a legally protected "indivisible interest in the property and assets of the corporation" (*Pollitz* v. *Gould*, 202 N. Y. 11, 15 (1911)). Section 61-b destroys this protection.

Section 61-b is not a reasonable exercise of the state's police power (*Nashville C. & S. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 (1935); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922)). This Court denied the existence of police power in the states to impede access to the Courts through the imposition of liability for counsel fees in *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*, *supra*, and in *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566, 574 (1934).

A statutory fine of $5,000 was struck down in *Ex parte Young*, *supra*, as foreclosing access to the Court. Liquidated damages of $500 were held unconstitutional for the same reason in *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 340 (1913).

The liability to which plaintiff here is subject is clearly and unmistakably prohibitive. "A judicial review beset by such deterrents does not satisfy the constitutional requirements" (*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337 (1920)).

Section 61-b denies to plaintiff in the subject action the equal protection of the laws. It requires security from the small stockholder, but not from the large. Such a

classification is arbitrary and capricious, and bears no relationship to the objectives of the statute (*Frost* v. *Corporation Commission*, 278 U. S. 515, 522 (1929); *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214 (1945); *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155 (1897)).

The statute bears all the earmarks of "invidious discrimination" (*Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 85 (1946)), which makes it obnoxious to the Fourteenth Amendment (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942)).

Finally, it should be observed that Section 61-b denies full faith and credit to the public acts of the State of Delaware in violation of Article IV, Section 1, of the Constitution of the United States.

Under the laws of Delaware plaintiff could prosecute this action without incurring any obligation to furnish security for expenses. The State of Delaware is "competent to legislate" concerning that subject matter (*State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 160 (1945)). It is for Delaware, not for New York, to say whether stockholders in its corporations, as the price for bringing a derivative suit against the corporate directors, must assume responsibility for the expenses of the litigation (*Cohen* v. *Beneficial Industrial Loan Corporation, supra*). New York cannot force such protection upon a corporation organized in a foreign state which does not wish to give it. No legitimate interest of New York is affected if the foreign corporation, in accordance with the laws of its origin, does not receive reimbursement (*Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389 (1924); *Order of United Commercial Travelers* v. *Wolfe*, 67 S. Ct. 1355 (1947)).

> "It seems clear that section 61-b violates both the due process and equal protection clauses of the state and federal constitutions" (*Zlinkoff, The American Investor and the Constitutionality of Section 61(b) of the New York General Corporation Law, supra*, 54 Yale L. J., at 390).

Conclusion

The decision of the Circuit Court of Appeals is in accordance with the principles of law established by this Court. No question of public importance is presented and there is no conflict of decision. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

On the Brief:
GLORIA AGRIN.

APPENDIX

Text of Sections 61-b and 64 of the General Corporation Law of New York

Section 61-b. *Security for expenses.*

In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five percentum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifity thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.

Section 64. *Assessment of expenses.*

Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed

against the corporation or against another corporation
the request of which he served as such director, officer
employee, upon court order, in the manner and to the exte
provided by sections sixty-five, sixty-six and sixty-seve
of this chapter, and in the instances specified in sectio
sixty-eight of this chapter, except in relation to matte
as to which it shall be adjudged in such action, suit
proceeding that such officer, director or employee is liab
for negligence or misconduct in the performance of h
duties.